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Legal and Technical Commission

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Consideration and adoption of the draft regulations on the exploitation of mineral resources in the Area

Draft regulations on the exploitation of mineral resources in the Area

Note by the secretariat

I. Introduction

1. The purpose of the present note is to provide the Legal and Technical Commission with an update on the development of draft regulations on the exploitation of mineral resources in the Area.

II. Background and progress to date

2. At its meetings in March 2018, the Commission continued its detailed review of the draft regulations[1] presented to the Authority and other stakeholders in August 2017 (see ISBA/24/C/9, sect. III.A). In the review, the Commission also considered requests from the Council (see ISBA/24/C/8, sect. VIII) and stakeholder responses to the draft regulations. The Commission then provided the secretariat with its comments, to be incorporated into a revised draft of the regulations. On the basis of its best judgment in reflecting those comments, the secretariat has prepared a revised text of the draft regulations (ISBA/24/LTC/WP.1 and ISBA/24/LTC/WP.1/Add.1).

III. Overview of structure and content of the revised draft regulations

3. The overall approach to revising the draft regulations has been to improve the structure and logical flow of the regulatory text and to achieve better balance between

[1] ISBA/23/LTC/CRP.3. Available from www.isa.org.jm/files/documents/EN/Regs/DraftExpl/ISBA23-LTC-CRP3-Rev.pdf.

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the rights and obligations of contractors. In order to aid further discussion of the structure and content of the draft, a table of contents has been added.

4. Part I of the revised draft contains a new regulation (draft regulation 2) proposed by the Commission to reflect the fundamental principles underlying the management and administration of exploitation activities in the Area and to strengthen the principle of the common heritage of mankind in the regulatory text, as requested by the Council (ISBA/24/C/8, para. 22 (a)). Part I also includes the duty of cooperation between various actors and the specific nature of that duty. Part II covers the requirements and process for the consideration of an application for the approval of a plan of work for exploitation (see sect. IV below and the annex to the present note).

5. Part III sets out the rights and obligations of contractors, including a new regulation on exclusive rights under exploitation contracts (draft regulation 19). That part also includes a more detailed mechanism for review prior to the commencement of production (draft regulation 26), together with the requirements relating to the environmental performance guarantee (draft regulation 27). Draft regulation 23, which relates to the use of an exploitation contract as security, has been modified. Draft regulation 31, which concerns the optimal mining of resources, has also been amended; this regulation is not intended to regulate commercial production per se, but to ensure the efficient conduct of activities in accordance with article 150 (b) of the United Nations Convention on the Law of the Sea.

6. The Commission revisited and expanded the content of part IV, which relates to the protection and preservation of the marine environment, to include details on the process for the assessment of environmental management and monitoring plans (draft regulation 50). Part IV, section 4, also provides for the establishment and use of an environmental liability trust fund, which will require further consideration in due course, including with regard to its funding and the interplay between such a fund, the environmental performance guarantee (draft regulation 27), insurance (draft regulation 38) and the regulation of environmental matters. The Commission agreed on the removal of the scoping exercise from the exploitation regulations, as scoping is more appropriately reflected under the exploration framework.

7. Part V addresses the process and procedure for material changes to plans of work (draft regulation 55), including updates to environmental management and monitoring plans. In draft regulation 56, the five-year review period has been retained, with the addition of various events or circumstances that would trigger a review of activities under a plan of work.

8. Part VI is now dedicated to closure plans and post-closure monitoring. While the indicative content for a closure plan is set out in annex VIII to the draft regulations, the objectives and principles of closure remain a topic for discussion.

9. Part VII relates to the administration and management of royalty payments under exploitation contracts. It now includes a regulation relating to financial incentives (draft regulation 61), in addition to some minor changes to the text. The provisions relating to the calculation of royalty payments have been moved to appendix IV, allowing for a more streamlined amendment process during the operational phase. Both the Council and the Commission benefited from a presentation by experts from the Massachusetts Institute of Technology in March 2018 in connection with the development of an economic model. Reflecting that exchange of views, the experts will present an update on their findings and suggestions, as well as responses to the questions raised by the Commission, to the Council, Commission and Finance Committee in July 2018.

10. Part VIII of the draft now consolidates all regulations on annual, administrative and other applicable fees into a single part.

11. In part IX, which relates to confidentiality, the definition of confidential information now includes data and information so designated by the Council (draft regulation 87 (2) (c)). This follows stakeholder support for the development of a list of types of confidential information, which was endorsed by the Council. A process to develop this list and the timing of its development have yet to be addressed. Procedures to ensure confidentiality (draft regulation 88) have been expanded to mirror the text of the exploration regulations.

12. Part X, which contains general provisions, now also includes the process for the adoption of standards as defined in the draft regulations (draft regulation 92) and the issue of guidance documents (draft regulation 93). In part XI, the topics of inspection, compliance and enforcement have been consolidated into one part.

13. The content of part XII, relating to the settlement of disputes, has been streamlined, and the proposed administrative review mechanism has been removed in the light of comments from member States and the Commission concerning the finely crafted dispute settlement provisions of part XI, section 5, of the Convention.

14. The content of the annexes and appendices remains open for further comments and input from the Commission and should be considered indicative at the present time.[2]

IV. Key concepts and areas for development

Standards and guidelines

15. Draft regulation 1 (5) provides that the regulations are to be supplemented by standards and guidelines.

16. The draft regulations presented in August 2017 contained references to "guidelines" and "standards" of the Authority and to "recommendations" of the Commission, which gave rise to possible confusion in the regulatory text. Various requests were addressed to the Commission by the Council, including requests to re-examine the legal status of the Commission's recommendations, to formulate a process for the development of standards and guidelines and to consider the timing of a workshop for that purpose (see ISBA/24/C/8, paras. 35–39).

17. The revised draft regulations provide for the adoption of standards by the Council on the basis of recommendations of the Commission (draft regulation 92), and for the issuance of guidelines by either the Commission or the Secretary-General, with the necessary degree of oversight by the Council with regard to the content of guidelines (draft regulation 93). In future, the Commission will issue "guidelines" rather than "recommendations".

18. As currently envisaged, standards will play a key role in the implementation of the regulations and in monitoring performance and will reflect substantive requirements. Guidelines will support the implementation of the regulations from an administrative and technical perspective. They will also clarify documentation requirements for applications, specify process requirements (e.g., for the public comment process, annual reporting and periodic review) and provide guidance on the interpretation of regulatory provisions. Both standards and guidelines will contribute to the development of good industry practice and provide a flexible framework which can be adapted in the light of new knowledge and information. While standards can

[2] Owing to the review process and translation workflow, the template for the environmental impact statement will be issued as an addendum to ISBA/24/LTC/WP.1 so as not to delay the release of the draft regulations.

in principle be considered mandatory and guidelines recommendatory in nature, the legal status of each will be determined largely by their content.

19. At its meetings in March 2018, the Commission set up a working group to examine the role of standards and guidelines and to prepare terms of reference for a future workshop on standards. The group will continue its work, including the preparation of terms of reference for a separate workshop on guidelines, during part II of the 2018 session, to be held in July.

Good industry practice, best environmental practice and best available techniques

20. The draft contains a number of definitions and key concepts which appear repeatedly in the regulatory text, including "good industry practice" and "best environmental practice". Those terms and their respective meanings are fundamental to supporting the delivery of best practice. At its meetings in March, the Commission acknowledged that further work must be carried out in defining and operationalizing these key concepts, including the development of appropriate criteria, which draw on examples from parallel regulatory regimes. The Commission also acknowledged the absence of the concept of best available techniques in the previous draft. Best available techniques are now mentioned in draft regulation 13 (3) (f) and draft regulation 46 (b), for further consideration, including the development of suitable criteria to support their implementation.

V. Moving from exploration to exploitation

21. For the sake of clarity, the annex to the present note contains a flow chart depicting the application and approval process for a plan of work for exploitation, and the approval mechanism for any material changes to a plan of work after the execution of an exploitation contract and prior to the commencement of production.

22. The documentation requirements for an application are listed in draft regulation 7 (3), and indicative content for certain documents is set out in the relevant annexes to the draft regulations. Detailed guidance on the content and format of the respective parts of a plan of work will require expert drafting in due course.

23. The content of an application is based on the results, data and information arising from exploration activities, as prescribed in the regulations. At its meetings in March, the Commission examined section 11 of the standard clauses for exploration contracts. Such data and information include copies of geological, environmental, geochemical and geophysical data, geological, technical, financial and economic reports and the estimation of mineable areas, mineral reserves and anticipated mining conditions, and will form the primary input with regard to information needs for an exploitation application.

24. The requirement of a mining workplan has been reintroduced, and the content of such a workplan has been broadly outlined in annex II to the draft regulations. Such a workplan is to be based on the results of exploration at a pre-feasibility study level for an application[3] and updated in the light of a feasibility study to be submitted prior to the commencement of production (draft regulation 26 (1)).

[3] Enclosure 1 to annex V to ISBA/21/LTC/15 provides guidance on the type and level of the study to be undertaken to enable the conversion of mineral resources into mineral reserves. The reporting standard of the Authority does not require a final feasibility study to have been conducted in order to convert mineral resources into mineral reserves, but it requires that studies, at least at the pre-feasibility level, have determined a mining workplan that is technically achievable and economically viable and that all modifying factors have been considered.

25. The Commission will continue its re-examination of information needs and documentation requirements for an application for a plan of work for exploitation, and it will provide any necessary clarification in due course. At the same time, the Commission highlighted that its recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area (ISBA/19/LTC/8) and its recommendations on the content, format and structure of annual reports (ISBA/21/LTC/15) set out the information needs of the Authority in anticipation of commercial exploitation activities.

Contract area and mining area

26. The Commission also examined the concepts of "contract area" and "mining area". On the basis of the results of exploration, specific mining areas will be identified under a proposed plan of work for exploitation. Identified mineral reserves will be recovered from those mining areas in accordance with the exploitation contract. Under draft regulation 55, mining areas may be modified from time to time. The mining area or areas sit within a wider contract area, within which exploration activities may be carried out.

27. The total area allocated to a contractor (i.e., the contract area) cannot exceed the area that would remain under a contract for exploration (draft regulation 16 (3) (c)). In the case of polymetallic nodules, approved mining areas within the contract area would typically account for some 10 to 15 per cent of the total area.

28. The revised draft provides for the exclusive right to explore and exploit a resource in the contract area (draft regulation 19 (1)).[4] Draft regulation 19 (7) provides that any exploration activities are to be conducted under the applicable exploration regulations and reported on in an annual report (draft regulation 40 (2) (k)). However, while there is an exclusive right to explore, there is no corresponding obligation to do so. The Commission will re-examine this matter at its meetings in July and provide feedback to the Council.

VI. Commentary and action by the Commission

29. The Commission is invited to review the draft texts in documents ISBA/24/LTC/WP.1 and ISBA/24/LTC/WP.1/Add.1 during its forthcoming meetings, making such revisions as may be necessary. The Commission is also invited to prepare a report to the Council identifying matters requiring further investigation or study and any matters requiring direction or guidance from the Council (see ISBA/24/C/8, para. 20).

30. The Commission is also invited:

(a) To consider, in collaboration with the Finance Committee, a recommendation to the Council on a suggested working methodology and way forward in the development of a payment mechanism and the financial terms of a contract;

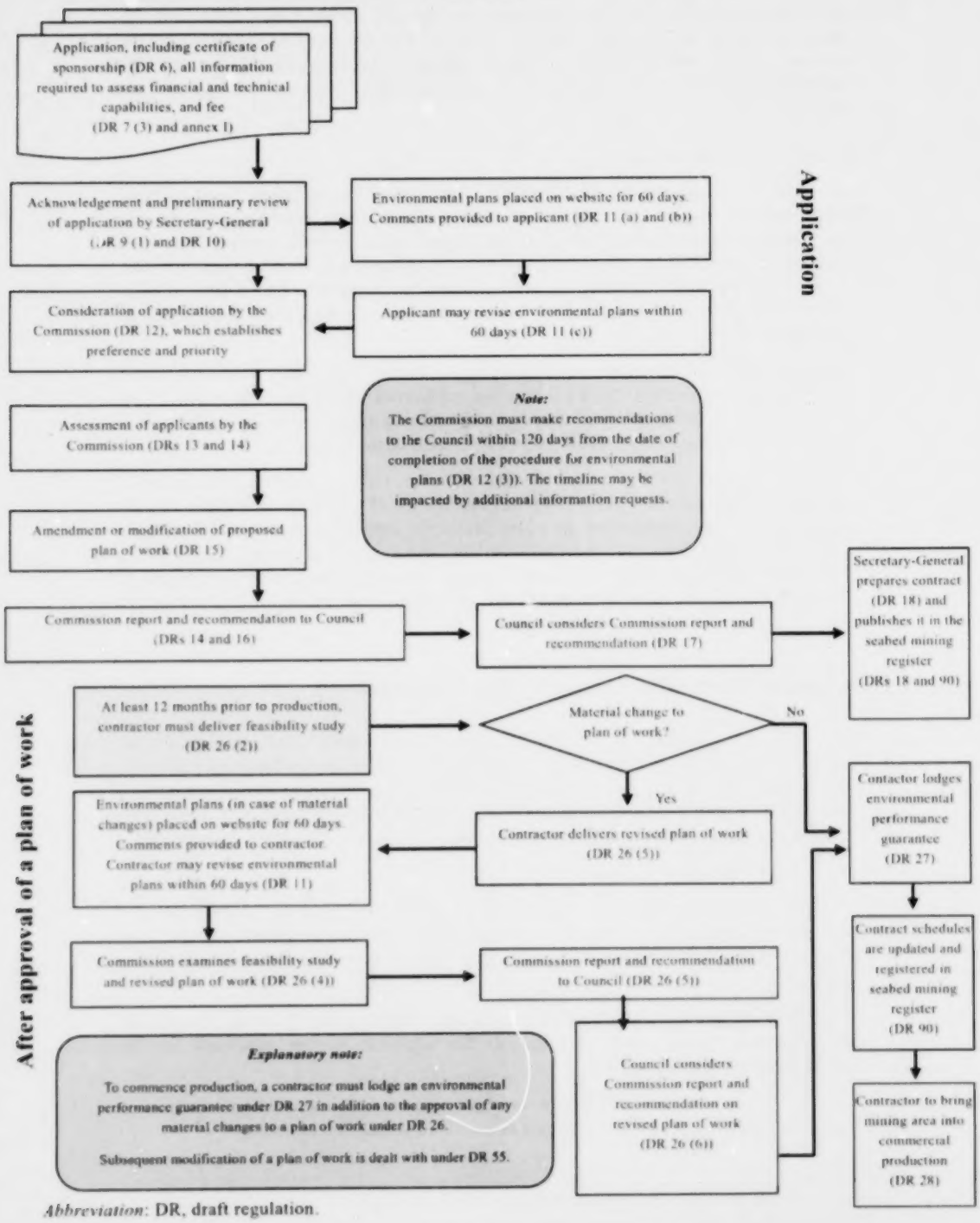
(b) To provide input on the terms of reference for a workshop on the development and adoption of standards for activities in the Area and for the development of guidelines;

(c) To consider further how to regulate continued exploration activities in areas not subject to mining workplans under an exploitation contract.

[4] Save for minor modification, the definitions of "exploitation" and "exploration" now reflect the meaning of those terms as defined under the exploration regulations.

Annex

Application and approval process for a plan of work for exploitation in the form of a contract


Application
Application, including certificate of sponsorship (DR 6), all information required to assess financial and technical capabilities, and fee (DR 7 (3) and annex I)
Acknowledgement and preliminary review of application by Secretary-General (DR 9 (1) and DR 10)
Environmental plans placed on website for 60 days. Comments provided to applicant (DR 11 (a) and (b))
Consideration of application by the Commission (DR 12), which establishes preference and priority
Applicant may revise environmental plans within 60 days (DR 11 (c))
Note:
The Commission must make recommendations to the Council within 120 days from the date of completion of the procedure for environmental plans (DR 12 (3)). The timeline may be impacted by additional information requests.
Assessment of applicants by the Commission (DRs 13 and 14)
Amendment or modification of proposed plan of work (DR 15)
Commission report and recommendation to Council (DRs 14 and 16)
Council considers Commission report and recommendation (DR 17)
Secretary-General prepares contract (DR 18) and publishes it in the seabed mining register (DRs 18 and 90)
After approval of a plan of work
At least 12 months prior to production, contractor must deliver feasibility study (DR 26 (2))
Material change to plan of work?
No
Yes
Contactor lodges environmental performance guarantee (DR 27)
Environmental plans (in case of material changes) placed on website for 60 days. Comments provided to contractor. Contractor may revise environmental plans within 60 days (DR 11)
Contractor delivers revised plan of work (DR 26 (5))
Contract schedules are updated and registered in seabed mining register (DR 90)
Commission examines feasibility study and revised plan of work (DR 26 (4))
Commission report and recommendation to Council (DR 26 (5))
Explanatory note:
To commence production, a contractor must lodge an environmental performance guarantee under DR 27 in addition to the approval of any material changes to a plan of work under DR 26.
Subsequent modification of a plan of work is dealt with under DR 55.
Council considers Commission report and recommendation on revised plan of work (DR 26 (6))
Contractor to bring mining area into commercial production (DR 28)

Abbreviation: DR, draft regulation.